ZURAIDI ABDULLAH

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[CRIMINAL APPEAL NO: 42-21-03]
31 DECEMBER 2003

CRIMINAL PROCEDURE: *Sentence - Principles - Previous conviction - Lapse of seven years since last conviction - Whether 'gap principle' to be applied - Possession of heroin - Sentence of 3 years' imprisonment - Whether adequate - Dangerous Drugs Act 1952 s. 12(2)*

The appellant had pleaded guilty to a charge under s. 12(2) of the Dangerous Drugs Act 1952 for possession of O.15 gram of heroin, and was sentenced to three years' imprisonment. In this appeal against the sentence imposed, the appellant argued that it was wrong of the trial judge to have considered his previous convictions when passing sentence, as the last of the convictions had been recorded some seven years ago. It was further argued that the trial judge ought to have applied the 'gap principle' in the circumstances, and imposed a lesser sentence on him.

Held (dismissing the appeal):

[1] The gap principle could not be assumed automatically as it would have to depend on the facts of each case and the type of offences committed. Be that as it may, the principle to be adopted is that in regard to appeals against sentences, unless the judge proceeded on wrong principles or given undue weight to the evidence, the court will not interfere. (pp 851 g & 852 a)

[2] There is no reason to disturb the sentence imposed by the trial judge. While the trial judge had made a wrong reference to the previous conviction (taking it as 7 months' imprisonment instead of 3 months' imprisonment and a fine of RM600), he did emphasize on public interest and deterrence and the fact that the appellant was having possession of the same type of drug as his last conviction. This aside, the plea that the appellant was working is not a strong mitigating factor in the circumstances. (pp 851 h & 852 b-e)

a **Case(s) referred to:**
PP v. Ravindran & Ors [1993] 1 MLJ 45 ***(refd)***
Rex v. Leo De Cruz SSR [Vol IV] 1 ***(refd)***
Soosainathan v. PP [2001] 6 CLJ 44 HC ***(refd)***
Zaidon v. PP [1996] 4 CLJ 441 HC ***(refd)***

b **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 12(2)

For the appellant - Suresh; M/s Kuldip & Co
For the respondent - Fahmi Moin, DPP

c *Reported by WA Sharif*

JUDGMENT

Heliliah Mohd Yusof J:

The appellant appealed against a sentence of three years of imprisonment
d imposed by the Sessions Court judge on 30 April 2003. He was charged for an offence under s. 12(2) of the Dangerous Drugs Act 1952. According to the Record of Appeal at the time of his arrest the appellant was found in possession of nine plastic packets which were proved to be heroin and upon analysis it was established that the total weight of the heroin was 0.15 gm. The Sessions
e Court judge recorded that the appellant had pleaded guilty unequivocally.

The grounds of judgment of the Sessions Court judge disclosed that he had taken into account the plea in mitigation and on record the plea was:

> Minta hukuman ringan dan dijalankan dari tarikh tangkap. Pohon hukuman
f seringan-seringannya.

On appeal before me, counsel for appellant contended that the sentence was manifestly excessive. It was also contended that the Sessions Court judge had given undue weight to the factors of public interest as against the interests of the appellant and this according to counsel amounts to a misdirection. The
g Sessions Court judge had stated:

> Penyalahgunaan telah dikaitkan dengan berlakunya kesalahan-kesalahan seperti rompakan, samun dan curi. Kesemua kesalahan ini telah menggangu kehidupan yang tenteram yang patut dinikmati oleh masyarakat. Kerana itu kesalahan berkait dadah mestilah diberi pandangan berat dan dicegah supaya
h penyalahgunaan dadah dapat dihapuskan dan masyarakat dapat bebas dari masalah yang ditimbulkan oleh penagih dadah.

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Apart from the above reference was made to *PP v. Ravindran & Ors* [1993] 1 MLJ. This decision relates to discounts or credits for the plea of guilty as well as mitigating factors. The Sessions Court judge specifically mentioned previous convictions as another factor.

With regard to this factor counsel for the appellant had contended that the judge had not only misconstrued the previous term of imprisonment as seven months but there was also what he termed the "gap principle" as explained in *Soosainathan v. PP* [2001] 6 CLJ 44. In that case the first conviction was for possession of an offensive weapon, the second for armed robbery and the third for possession of heroin for which the sentence was 24 months' imprisonment to be followed by one year's police supervision. Counsel for appellant in the appeal before me also invited the court to apply the same principle that is, on the facts of the case since the last previous conviction was a fine of RM600, three months' imprisonment and two years of supervision, as well as another case where in respect of another report the term of imprisonment was 1 day, a fine of RM1,200 and in default six months' imprisonment.

In urging the court to apply the "gap principle" it was argued that during the period of seven years since his last conviction the appellant was working with his father in a used car workshop. In addition it was contended that the weight of the drugs clearly showed that it was mere possession and if the prosecution had thought that the appellant was selling then the prosecution could have made use of s. 2 of the Dangerous Drugs Act 1952 that is trafficking.

I am of the view that this last argument was untenable as it is not for the court to consider whether the prosecution would have charged him for trafficking or otherwise for that is the responsibility of the prosecution and not for the court to surmise what would have been the more suitable charge as it would depend on the amount of drugs and other factors surrounding the case.

However I also held the view that the gap principle could not be assumed automatically as it would have to depend on the facts of each case and the type of offences committed. Admittedly in this case the Sessions Court judge appeared to have been influenced by the fact that there was a repetition of the misuse of the same type of drug ie, heroin. The plea that he was working is not a strong mitigating factor since if he was indeed **gainfully occupied** yet he has admitted to the offence and it was late in the day to say that on that premise he would turn over a new leaf. In any case Augustine Paul J (as he then was) explained the matter further in *Zaidon v. PP* [1996] 4 CLJ 441. The principle that I have adopted is that in regard to appeals against sentence,

unless the Judge has proceeded on wrong principles or given undue weight to some of the evidence the court will not interfere. *Rex v. Leo De Cruz SSR* [Vol IV] 1.

Finally I found that while the judge had made a wrong reference to the previous conviction as seven months his consideration is found at the end as follows:

> Saya berpendapat hukuman penjara yang selama 3 tahun yang mulai dari tarikh ditangkap merupakan hukuman yang sesuai dikenakan dan hukuman ini juga di harap dapat memberi pengajaran kepada masyarakat dan tertuduh.

I hold the view that the Sessions Court judge was emphasizing on public interest and deterrence since the type of drug found was heroin, that is the same type of drug that the appellant was previously convicted for. Apart from pleading that he was gainfully occupied there was no evidence to show whether he was indeed an addict or whether he was in possession for personal consumption. Consumption not lawfully authorized should not be given judicial recognition.

The court has to lead public opinion on the question of deterrence. For this reason I hold the view that in the circumstances of the case to disturb the sentence would lead to uncertainty for no official statistics are available to show what should be the range of sentences but that is another matter not before the court.